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No. 90-863

SUPREME COURT, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1990

SABAT QUINONES CANDELARIO, PETITIONER

*v.*

ANTHONY M. FRANK,
POSTMASTER GENERAL OF THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether principles of administrative res judicata preclude the Postmaster General from raising a postal employee's failure to mitigate damages in an action to enforce a decision of the Equal Employment Opportunity Commission.

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**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 906 F.2d 798. The opinion of the district court (Pet. App. A22-A46) is reported at 715 F. Supp. 414.

## JURISDICTION

The judgment of the court of appeals was entered on June 26, 1990. A petition for rehearing was denied on September 4, 1990. Pet. App. A87-A88. The petition for a writ of certiorari was filed on November 26, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner, a veteran who is partially disabled by a back condition, was hired by the United States Postal Service as a probationary part-time postal clerk in August 1979. On September 6, 1979, the Postal Service discharged petitioner on the basis of a medical determination that his back condition was incompatible with heavy lifting and other physical requirements of the job. Petitioner filed a complaint with the Postal Service asserting that the Service had unlawfully discriminated against him on account of his disability, in violation of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 390 (codified at 29 U.S.C. 701 *et seq.*). See 29 C.F.R. Pt. 1613.[1] The Postal Service issued a final agency decision finding that petitioner's termination was not discriminatory. Pet. App. A5-A6, A23-A25, A64-A69.

Petitioner appealed to the Equal Employment Opportunity Commission (EEOC), which rendered a decision in his favor in April 1985. Pet. App. A63-A82. The sole issue considered by the EEOC was "whether the record supports a finding of no discrimination." *Id.* at A73. The EEOC determined that petitioner's discharge was improperly based on his physical condition and ordered the Postal Service to "reinstate [petitioner] at the paygrade he would normally have reached if not terminated, and award him backpay for the period from his termination to his reinstatement." *Id.* at A78. The EEOC neither considered nor determined the amount of back pay due petitioner, and the parties presented no argument or evidence on this question. See *id.* at A37.

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[1] The procedures of 29 C.F.R. Pt. 1613 apply to employment discrimination complaints by federal employees. The procedures of 29 C.F.R. Pt. 1601 apply to discrimination complaints by state and private employees.

2. The Postal Service reinstated petitioner in June 1985. In accordance with the requirement that "[i]nterim earnings or amounts earnable with reasonable diligence by the person * * * discriminated against shall operate to reduce the back pay otherwise allowable," 42 U.S.C. 2000e-5(g),[2] the Postal Service asked petitioner to submit proof of his earnings and efforts to obtain other employment during the back pay period. Petitioner submitted documents indicating that, apart from 100 hours of part-time work, he had no interim earnings. Petitioner's submissions showed that he had not sought unemployment compensation during the back pay period, and that he was a full-time university student for three years. See C.A. App. 16-18. In March 1986, the Postal Service determined that petitioner had not made reasonable efforts to obtain other employment and denied him back pay. Pet. App. A27-A28.

Petitioner submitted additional documents in August 1986, including undated applications for employment, a letter stating that he had been a student in a vocational rehabilitation program, and a handwritten log setting forth the names and business cards of employers that he claimed to have contacted. C.A. App. 20. Upon investigation, the Postal Service determined that the additional materials were suspect, and again denied petitioner's claim for back pay. Pet. App. A31.

3. Petitioner then brought an enforcement action in district court. See 42 U.S.C. 2000e-5(g), 2000e-16(c); 29 C.F.R. 1613.281 (1986). He moved for summary judgment, arguing that the Postal Service had not raised his alleged failure to mitigate damages before the EEOC and therefore was precluded by the doctrine of administrative res judicata from raising the issue in the district court. The district court

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[2] Section 2000e-5(g) is incorporated by reference in the Rehabilitation Act. See 29 U.S.C. 794a(a)(1).

granted summary judgment for petitioner. Pet. App. A22-A46. The court found that "the EEOC serves in a judicial capacity" and renders a "final judgment [on the merits] with which the Postal Service is obligated to comply." *Id.* at A38-A39. Although the district court agreed with the Postal Service that "before the EEOC, there was no inquiry into the reasonable-diligence issue, and there was no calculation of the back pay," *id.* at A37, the court concluded that the Postal Service was "precluded from raising the reasonable-diligence issue if it could have raised it in the administrative proceeding," *id.* at A39. The court held that "[t]he exact construction of the back-pay award [was] a proper subject of the EEOC proceedings," *id.* A40-A41, and found "no legislative policy that would favor separate, collateral review of the reasonable-diligence issue," *id.* at A42-A43.

4. The court of appeals reversed. Pet. App. A1-A19. The court of appeals agreed with the district court that "[s]ince the EEOC acted in a judicial capacity, any factual determination that it made may be subject to the doctrine of *res judicata*." *Id.* at A12. But the court observed that administrative res judicata would not apply to the EEOC proceedings "in the face of contrary public policy," such as "when it would result in a 'manifest injustice.'" *Id.* at A13 (citing cases). The court concluded that to preclude the Postal Service from raising the mitigation issue in a subsequent enforcement action "would be a 'manifest injustice'" and "would violate the statutory mandate in compliance proceedings brought before the district court [under Section 2000e-5(g)] that '[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.'" *Id.* at A13-A14.

The court of appeals observed that "[t]he proceeding before the EEOC was concerned with a liability determination, and was not necessarily the appropriate forum for a

precise determination of [petitioner's] damages." Pet. App. A14. The court also noted that the applicable regulations "[n]owhere * * * direct the EEOC to determine in that proceeding the specific amount of back pay due the complainant," *ibid.*, nor do they specify "which body [the EEOC or the employing agency] must determine back pay in the first instance," *id.* at A15. Moreover, "in practice, it appears that in typical proceedings the EEOC does not compute back pay in the first instance." *Id.* at A15-A16. The court concluded that to require the EEOC, contrary to its current practice, to compute the specific amount of back pay due in all future administrative appeals "would not foster administrative efficiency," because the initial calculation of back pay involves "matters that can best be considered and determined by the agency which had employed the complainant." *Id.* at A17-A18. Accordingly, the court of appeals vacated the judgment and remanded the case for further proceedings.

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. In addition, the court of appeals has remanded this case to the district court for further proceedings. Because petitioner may recover the back pay he seeks on remand, interlocutory review of the court of appeals' decision is not warranted.

1. Petitioner contends (Pet. 20-29, 44-60) that the Postal Service should have raised his alleged failure to mitigate damages in the EEOC proceedings on the merits of his discrimination complaint. In petitioner's view, principles of administrative res judicata preclude the Postal Service from raising the mitigation issue in a subsequent enforcement action. Petitioner further contends (Pet. 29-43) that the court

of appeals erred in declining to apply administrative res judicata here on the basis of public policy and to avoid manifest injustice. These contentions are unpersuasive.

a. Administrative res judicata applies "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966). See also *University of Tennessee* v. *Elliott*, 478 U.S. 788, 797-798 (1986) (issue preclusion applies to factfinding of administrative bodies acting in a judicial capacity); *Kremer* v. *Chemical Constr. Co.*, 456 U.S. 461, 484-485 n.26 (1982). Although the EEOC acted in a judicial capacity in this case, it did not resolve any disputed issues of fact concerning the amount of back pay due. And because the amount of back pay due generally is determined by the employing agency in the first instance, after the EEOC has issued its decision on the merits, the proceedings before the EEOC did not afford the Postal Service an adequate opportunity to litigate the mitigation issue.

The sole issue before the EEOC was "whether the record supports a finding of no discrimination." Pet. App. A73. The district court expressly found that "[w]hen the present case was before the EEOC, there was no inquiry into the reasonable-diligence issue, and there was no calculation of the back pay owed to [petitioner]."[3] *Id.* at A37. This was consistent with the EEOC's usual practice. As the court of

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[3] Consequently, the district court's suggestion that principles of collateral estoppel (issue preclusion) prevent the Postal Service from raising the mitigation issue in a subsequent proceeding (Pet. App. A35-A38) is plainly incorrect. See Restatement (Second) of Judgments § 27 (1982) (issue preclusion applies to issues "actually litigated and determined" in a prior proceeding).

appeals recognized (*id.* at A15-A17), the EEOC generally does not compute the amount of back pay due a successful claimant. In *Snow* v. *United States Postal Service*, 88 Fed. Eq. Opportunity Rep. (Labor Rel. Press) ¶ 1,030 (Sept. 30, 1987), for example, the EEOC issued an order directing the Postal Service to reinstate an employee and award back pay, and later issued a separate order affirming the Postal Service's denial of back pay for failure to mitigate damages.[4]

The EEOC's procedures focus on resolving claims of discrimination on the merits. See 29 C.F.R. 1613.213-1613.218 and 1613.221-1613.234. The regulations provide that, upon a final finding of discrimination, the Commission may order appropriate corrective action, 29 C.F.R. 1613.234 and 1613.271, which ordinarily should include "[p]ayment * * * on a make whole basis for any loss of earnings the person may have suffered as a result of the discrimination." Section 1613.271(a)(4). The employing agency is required to report to the EEOC within a prescribed time that "the corrective action has been taken." Section 1613.234(a). If the employee is dissatisfied with the level of compliance, he is entitled to file a civil suit for enforcement in district court. 42 U.S.C. 2000e-16(c); 29 C.F.R. 1613.281 (1986). See *Moore* v. *Devine*, 780 F.2d 1559, 1563

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[4] Petitioner attempts to distinguish *Snow* by noting that the remedial order in that case directed the Postal Service to award back pay reduced by amounts earned, and the EEOC processed the agency's subsequent back pay determination as an administrative appeal rather than as a compliance report. Pet. 51-53. But the EEOC in *Snow* clearly treated the back pay calculation as a separate stage of the process that followed determination of the employee's claim of discrimination on the merits. In *Gellington* v. *Department of Justice*, 87 Fed. Eq. Opportunity Rep. (Labor Rel. Press) ¶ 1,040 (Apr. 15, 1987), the EEOC considered the mitigation issue on the initial appeal because the employing agency had already found discrimination and the employee's appeal was from the agency's partial denial of back pay for failure to mitigate.

(11th Cir. 1986). As the court of appeals recognized (Pet. App. A17-A18), the practice of deferring calculation of back pay until after a determination on the merits of a discrimination claim promotes administrative efficiency by allowing the EEOC to focus its resources on the claims itself while the employer, in the first instance, performs the largely ministerial task of assembling the information needed to implement the usual remedy of reinstatement and back pay.[5]

Because the EEOC generally does not calculate the amount of back pay due in the first instance, the parties in this case did not have an adequate opportunity to litigate back pay issues before the EEOC. Indeed, petitioner's argument, if taken seriously, would preclude him from recovering any back pay because he failed to present evidence concerning the amount of back pay due. See *Taylor* v. *Philips Indus., Inc.*, 593 F.2d 783, 787 (7th Cir. 1979) ("Under [Title VII's make whole] formula, before the court may award damages, plaintiff must first establish that she has, in fact, sustained an economic loss from defendant's discrimination. * * * Not until the plaintiff establishes what she contends are her damages does the burden of going forward to rebut the damage claim or to show plaintiff's failure to mitigate damages, fall on defendant."). Accord *Horn* v. *Duke Homes Div. of Windsor Mobile Homes, Inc.*, 755 F.2d 599, 606 (7th Cir. 1985) (back pay ordinarily is granted Title VII plaintiffs, but "plaintiff has the burden of proving the

[5] Other federal remedial schemes also provide for the calculation of back pay in a separate stage of the proceedings, following a determination of liability. The National Labor Relations Board's regulations promulgated under the National Labor Relations Act (on which Title VII's back pay remedy was expressly modeled, see *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 419 (1975)), provide for calculation of make-whole damages at a later stage of the proceedings. See 29 C.F.R. 102.52-102.59. The Merit Systems Protection Board also typically resolves back pay issues at a separate stage. See *Frazier* v. *United States Postal Service*, 26 M.S.P.B. 584, 585-586 (1985).

damages caused her"); *Rasimas* v. *Michigan Dep't of Mental Health*, 714 F.2d 614, 623 (6th Cir. 1983); *Marks* v. *Prattco, Inc.*, 633 F.2d 1122, 1125 (5th Cir. 1981). In short, the doctrine of administrative res judicata does not apply to questions concerning the amount of back pay due, because the EEOC's decision did not "resolve[] disputed issues of fact" on that issue, and the parties did not "have * * * an adequate opportunity to litigate" those issues in the prior administrative proceeding, *Utah Constr. & Mining Co.*, 384 U.S. at 422.[6]

There is no merit to petitioner's contention (Pet. 20-29) that the procedure followed in this case permits a federal employer to overrule a back pay remedy ordered by the EEOC. The employer is bound by the EEOC's finding of discrimination. See 42 U.S.C. 2000e-16; *Moore* v. *Devine*, 780 F.2d at 1562. The employer's role is limited to making the initial calculation of the amount of back pay due. If the employee disputes the calculation, he has a right to seek resolution of that dispute by filing an enforcement action in district court (or, under current regulations, by petitioning the EEOC for enforcement of its order, see note 6, *supra*). Thus, contrary to petitioner's assertions (Pet. 20-21, 28-29), the decision in this case does not conflict with decisions holding that the EEOC's final decision in federal sector employment discrimination cases is binding on the employing agency. See *Haskins* v. *Department of Army*,

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[6] In 1987, after the events at issue in this case, the EEOC issued supplemental regulations that make it even clearer that compliance issues, including mitigation, generally are treated as separate from the merits of a discrimination complaint. The regulations establish a formal procedure by which a claimant may petition the EEOC for enforcement of a remedial order, and the EEOC may conduct further fact-finding. See 29 C.F.R. 1613.237-1613.239. Because it is now clear that federal employees may return to the EEOC for resolution of compliance issues, petitioner's contentions are of no continuing significance.

808 F.2d 1192, 1200 (6th Cir. 1987) (EEOC determination "must be reviewed [by a court in an enforcement action] in the context that it was made; facts which were not resolved by the EEOC in making such a determination cannot be read into such a finding upon a claimant's demand"). See also *Houseton* v. *Nimmo*, 670 F.2d 1375 (9th Cir. 1982); *Pecker* v. *Heckler*, 801 F.2d 709 (4th Cir. 1986).

b. Because principles of administrative res judicata do not preclude the Postal Service from raising petitioner's alleged failure to mitigate damages in an enforcement action, there is no need for this Court to consider petitioner's additional contention (Pet. 29-44) that the court of appeals should not have recognized an exception to administrative res judicata based on public policy and the avoidance of manifest injustice. But even if administrative res judicata ordinarily would apply here, the court of appeals' decision would not warrant further review.

In *Federated Dep't Stores* v. *Moitie*, 452 U.S. 394, 401 (1981), this Court rejected "public policy" and "simple justice" as reasons for excepting from the effects of res judicata parties who, for tactical reasons, elected not to appeal a lower court judgment. The lower court in *Moitie* had recognized that "strict application of the doctrine of *res judicata* would preclude * * * review of the instant decision," *id.* at 397 (quoting *Moitie* v. *Federated Dep't Stores, Inc.*, 611 F.2d 1267, 1269 (9th Cir. 1980)), yet nevertheless declined to apply the doctrine. This Court held that the concededly applicable doctrine of res judicata should have been applied, because the ends of justice are "achieved when a complex body of law developed over a period of years is evenhandedly applied," and because exceptions to pertinent law should not be invoked based on "any individual judge's ad hoc determination of the equities in a particular case," 452 U.S. at 401.

*Moitie* offers no support for petitioner's position. The court here did not expressly hold that res judicata was

applicable and then decline to apply the doctrine because of an "ad hoc determination of the equities," 452 U.S. at 401. Rather, the court determined that in light of the nature of EEOC proceedings res judicata did not apply to such proceedings. See also *International Harvester Co.* v. *Occupational Health and Safety Review Comm'n*, 628 F.2d 982, 984-986 (7th Cir. 1980) (administrative res judicata does not apply to issues not reached in the previous administrative proceeding).

The court of appeals concluded that to preclude the Postal Service from asserting petitioner's failure to mitigate damages in his enforcement action would force the EEOC to adopt less efficient administrative procedures, Pet. App. A17- A18, and would violate the statutory requirement that back pay must be reduced by the amount which the claimant earned, or with reasonable diligence could have earned, in the back pay period. Pet. App. A13-A14. In the absence of a conflict in the circuits, the court of appeals' decision presents no issue calling for review by this Court.

2. The court of appeals correctly rejected petitioner's claim (Pet. 64-65) that he is a "prevailing party" in his enforcement action for purposes of an award of attorney's fees. A plaintiff is not a prevailing party unless he has achieved some of the benefit sought in bringing the action. *Texas State Teachers Ass'n* v. *Garland Indep. School District*, 489 U.S. 782, 790-792 (1989); *Sullivan* v. *Hudson*, 109 S. Ct. 2248, 2255 (1989). See also *Hanrahan* v. *Hampton*, 446 U.S. 754, 759 (1980). Because petitioner has yet to achieve any of the benefit sought in his enforcement action, his claim for attorney's fees is premature.

## CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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